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IN THE

Supreme Court of the United States

October Term, 1936

No. 38

MOUNTAIN STATES POWER COMPANY,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF MONTANA, et al,
Appellees.

APPELLANTS' REPLY BRIEF

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Statement of the Case

The appellees assert that the allegations of appellant's complaint in the court below have not yet been established and will be controverted by answer.

The question of jurisdiction, here involved, was submitted to the lower court, upon appellees' motion to dismiss (R. 39), which is the equivalent of a demurrer. No answer has yet been filed.

> "The facts alleged are admitted by the demurrer, and, in determining their legal effect as a deprivation of plaintiff's legal rights under the 14th Amendment, we are at as full liberty to consider them as was the State Supreme Court." (Citing cases).
>
> *Truax* v. *Corrigan,* 257 U. S. 312, 324.

Reply to Appellees' Proposition Concerning Constitutionality of Section 3906, Revised Codes of Montana, 1921, Denying Injunction Pendente Lite.

The sole proposition in justification of the lower court's denial of jurisdiction, presented by appellees in their brief, is that Section 3906 R.C.M., 1921, in so far as it denies an injunction pendente lite, is unconstitutional and void, that so being, the statute should be read as though that provision were not in it, and that the appellant company should have proceeded in the State courts irrespective of that direct statutory prohibition.

Appellees admit that as the statute now stands it does deny injunctive relief against the confiscatory rate order pending final determination by the State courts.

When occasion arose to bring this suit the provision referred to stood upon the statutes of Montana as a valid law, construed by the courts of that State to mean just what it says in plain English, namely:

> "You can have no protection against the confiscation of your property while you are awaiting a determination of the merits of your case by the courts of this State."

A decision by this court as to the jurisdiction of the State courts under the constitution and laws of Montana is not binding upon the courts of that State; that is a question of state law which the courts of Montana may determine for themselves. In other words, this court can give appellant no assurance that the courts of Montana will afford a plain, speedy and efficient remedy to protect it against the admitted substantial, daily and continuing confiscation of its property.

In *Gasquet* v. *Lapeyre,* 242 U. S. 367, 369:

> "And, as our decisions show, there is nothing in the clauses of the 14th Amendment guaranteeing due

> process and equal protection which converts an issue respecting the jurisdiction of a state court under the Constitution and statutes of the state into anything other than a question of state law, the decision of which by the state court of last resort is binding upon this court." (Citing cases.)

In *McDonald* v. *Oregon R. and Nav. Co.*, 233 U. S. 665, 669, the court said:

> "It is elementary and needs no citation of authority to show that the due process clause of the 14th Amendment does not control methods of state procedure * * *."

As an evidence that the Supreme Court of Montana may entertain a different view as to the constitutionality of Section 3906, supra, we again direct attention to three decisions of that court wherein it considered, quoted, construed and applied the statute as denying an injunction pendente lite upon appeals under the Public Service Commission law of the State. The decisions referred to are, *Billings Utility Company* v. *Public Service Commission*, 62 Montana 21, *State ex rel Public Service Commission* v. *Great Northern Utilities Company*, 86 Montana 442; and *State ex rel Board of Railroad Commissioners* v. *District Court*, 53 Montana, 229. These decisions are cited and quoted at pages 13-15 of appellant's opening brief. In none of these cases was the direct question of the constitutionality of the statute involved but they indicate a meaning of the statute as contended by appellant and as admitted by appellee.

Section 2 of Article VIII of the Constitution of Montana gives to the Supreme Court of Montana "appellate jurisdiction only." Section 3 of Article VIII of that constitution authorizes the court to issue injunctions "as may be necessary or proper to the complete exercise of its appellate jurisdiction." Section 3 of Article VIII further provides

that the jurisdiction of the State Supreme Court extends to "all cases at law and in equity, *subject,* however, to such *limitations and regulations as may be prescribed by law.*"

The Supreme Court of Nevada, in *Steamboat Canal Co.* v. *Garson, et al.,* 43 Nev. 298, was considering a provision of the Public Service Commission Law of Nevada, which was *identical* with the provision of Montana Law here in question. The Montana statute (Sec. 3906) and the Nevada statute (Sec. 26, Ch. 162, Laws of 1911) read as follows:

> "(a) No injunction shall issue suspending or staying any order of the commission except upon application to the court or judge thereof, notice to the commission having been first given and hearing having been had thereon: Provided, that *all rates fixed by the commission* shall be deemed reasonable and just, and *shall remain in full force and effect until final determination* by the courts having jurisdiction."

In fact the entire section of the Nevada statute providing for appeals from Public Service Commission orders, was practically word for word with Section 3906 of Montana Revised Code, 1921. The procedure for reviewing Public Service Commission orders was identical in the two states.

The Supreme Court of Nevada, in the last above mentioned decision, *passed directly upon the constitutionality* of the above quoted proviso and said:

> "* * * We also conclude that the court was likewise wrong in vacating the order of the commission establishing the rate of $7.50 per miner's inch and restraining its collection by the Steamboat Canal Co. As already pointed out, Section 26 provides:
>
> > 'That all rates fixed by the Commission shall be deemed reasonable and just, and shall *remain in full force and effect until final determination* by the courts having jurisdiction.'

"The lower court disregarded this provision of the statute in vacating the order of the commission and in granting an injunction pendente lite. No reason for this action appears from the record, but as the statute is mandatory, and as counsel for respondents insists in this court that *it is unconstitutional,* we assume that the lower court entertained the same view.

"(10, 11) It is contended that the proviso is violative of Section 8 of article 1 of the Constitution guaranteeing that 'no person shall be * * * deprived of * * * property, without *due process of law,*' * * *"

"* * * The purpose of the proviso is, we think, reasonably apparent to maintain the rate during the pendency of the trial and until final judgment in the district court. And *this provision does not,* in our opinion, *trench upon the constitutional guaranty of due process of law.* The provision objected to must be taken in connection with the entire act of which it is a part when considered as to its encroachment upon the constitutional guaranty of due process of law. The ultimate purpose of the act is to regulate and control certain classes of business impressed with a public interest."

"* * * it was competent for the Legislature to prescribe that the rates fixed by the commission should abide during the temporary season of a trial to test their reasonableness. * * *"

"We think that none of the essentials necessary to insure to the parties a full guaranty of *due process of law* are absent from the statute, nor *impaired by the provision under consideration.*"

"(15, 16) But still statutes identical with the provisions making the findings of the commission prima facie evidence of reasonableness of rates have been uniformly upheld by the courts against constitutional objections, upon the theory that no person has a vested right in any rule of evidence. * * * The proviso does not withhold a remedy for the imposition of unreasonable rates. The remedy is merely deferred for a period of time which, considering the policy of the law towards the establishment of rates by the commission cannot be said to be unreasonable, especially

in view of the fact that the statute accelerates the trial of this class of cases by giving them precedence over all civil causes of a different nature."

Section 4 of Article VI of the Constitution of Nevada contains no limitation, such as is found in Sec. 3 of Article VIII of the Montana Constitution. Both the Constitutions of Nevada and Montana contain a "due process" clause. Sec. 8, Art. I, Const. of Nevada, Sec. 27, Art. III, Const. of Montana.

The appellant was bound to assume the constitutionality of Section 3906, supra, at the time it instituted its suit in the Federal court, and was not required to hazard the continued confiscation of its property by bringing a suit in the State court, to test the constitutionaliy of that State statute.

The effect of the appellee's proposition is that Section 3906, supra, might be declared unconstitutional by the Supreme Court of Montana or that the courts of the State might grant a supersedeas notwithstanding the prohibition contained in the statute. We do not believe the court will indulge in any such speculation.

A statute is presumed to be constitutional and valid until it is declared unconstitutional by a court of competent jurisdiction. The constitutionality of Section 3906, supra, has not been passed upon by the Supreme Court of the State of Montana, although the constitutionality of an identical statute has been sustained by the Supreme Court of Nevada. (*Steamboat Canal Co.* v. *Garson,* 43 Nev. 298.)

Under the decision of this court (*Pacific Tel. & Tel. Co.* v. *Kuykendall,* 265 U. S. 196) appellant was not required to test the constitutionality of this state statute before acting upon it, but was justified in taking it at its face and proceeding accordingly. The Montana statute in plain terms denies supersedeas and when read in connection

with the Johnson Act is a direction to proceed in the Federal Court. The appellant pursued the only plain, speedy and efficient remedy available to it.

Reply to appellees' proposition that if Section 3906 R.C.M. 1921, is unconstitutional, appellant has a remedy under the general laws of the State relating to injunction.

Our answer to this proposition is, first, that Section 3906, supra, stood as a valid statute at the time this suit was instituted in the Federal Court, and had not been declared unconstitutional by the Supreme Court of Montana,—in fact an identical statute had been held constitutional, as affording due process, by the Supreme Court of Nevada. *Steamboat Canal Co.* v. *Garson.* Second, the remedy for reviewing orders of the Public Service Commission of Montana as provided by Section 3906, supra, was an exclusive remedy.

It is a well established rule of law of procedure and remedies, that where specific procedure is provided the litigant must avail himself of that procedure.

In *Barnet* v. *Muncie National Bank,* 98 U. S. 555, it was held that where a statute creates a right and provides a specific remedy, that alone applies. Appellant, therefore, was fully justified in looking solely to the specific procedure provided by Section 3906, supra, when it was called upon to consider what remedy it had and to what forum it could resort for relief from the confiscatory order of the Commission.

United States v. *Babcock,* 250 U. S. 328.
Bancroft Code Practice and Remedies, (1927) Vol. I, Sec. 135.

Conclusion.

It would be difficult to more concisely state the rule applicable in this appeal, than primarily in the words of Mr. Justice Roberts, in *Porter* v. *Investors Syndicate,* 286 U. S. 461, 471, and Mr. Chief Justice Taft in *Pacific Tel. & Tel. Co.* v. *Kuykendall,* 265 U. S. 196, 205, namely,

(a) The "plain provisions" of Sec. 3906, R.C.Mont. 1921, and

(b) The "decisions of the state court interpreting the act," *Billings Utility Co.* v. *Public Service Commission,* 62 Mont. 21, *State ex rel Board of Railroad Commissioners* v. *District Court,* 53 Mont. 229, *State ex rel Public Service Commission* v. *Great Northern Utilities Co.,* 86 Mont. 442, and *Steamboat Canal Co.* v. *Garson,* 43 Nev. 298,

(c) Clearly "precludes a supersedeas or stay until the legislative process is completed by the final action of the reviewing court." *Porter* v. *Investors Syndicate, supra.*

(d) A ruling by this court as to the constitutionality of Sec. 3906, supra, would not be binding upon the state court in its determination of its own jurisdiction under the Constitution and laws of Montana. *Gasquet* v. *Lepeyre,* 242 U. S. 367.

(e) Therefore, there is no "plain, speedy or efficient remedy" in the state courts.

(f) The appellant may of right "base his application for equitable relief (in the federal court) on the *effect* of the statute and the *presumption of its validity* and is not required to establish that the state statute" (is or) "is not invalid under the State Constitution," *Pac. Tel & Tel. Co.* v. *Kuykendall,* 265 U. S. 196.

(g) And "where the other requisites of federal jurisdiction exist" (amount in controversy, confiscation, etc.) "recourse to a federal court of equity is justified," *Porter* v. *Investors Syndicate, supra.*

(h) And this, irrespective of the Johnson Act, which specifically *retains* jurisdiction in the federal courts in

such cases, "where a plain, speedy, and efficient remedy may (not) be had at law or in equity in the courts of such state." Johnson Act, U.S.C.A., Title 28, Sec. 41 (1).

All matters in parentheses and italics ours.

We respectfully submit the lower court was in error in denying jurisdiction and dismissing the suit and its decree should be reversed with directions to maintain in effect the existing bond and impoundment pending the hearing and determination of the applications for interlocutory and permanent injunctions.

Respectfully submitted,

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